

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA REEDER,) Civil No. 07-CV-362-L(LSP)
Plaintiff,) **ORDER GRANTING MOTION TO**
v.) **DISMISS [doc. #13] and DISMISSING**
JOHN KNAPIK DBA K/MONT) **THIS ACTION WITHOUT**
CONSTRUCTION, *et al.*,) **PREJUDICE AS TO JOHN KNAPIK**
Defendants.)

)

On February 26, 2007, Virginia Reeder, appearing *pro se*, filed the above-captioned case. Because the complaint was not signed by plaintiff, the Court dismissed the action without prejudice and granted plaintiff leave to file an amended complaint. On March 21, 2007, plaintiff filed a first amended complaint. [doc. #4].

Defendant John Knapik filed a motion to dismiss the amended complaint for ineffective service of process under Federal Rule of Civil Procedure 12(b)(5). Plaintiff filed a response in opposition to the motion contending service of process was effective.¹

¹ In her response, plaintiff also argues that defendant Knapik was required to respond to her request for discovery. This issue was not raised in defendant's motion to dismiss and is not considered by the Court here. Rather, the issue of discovery was raised in plaintiff's "motion for leave of court" [doc. #30] and was disposed of in the Court's May 22, 2007 Order. Plaintiff is admonished to refrain from interjecting issues that are not raised in a particular motion.

Discussion

2 A plaintiff must serve the defendant with a copy of summons and complaint within 120
3 days of filing a complaint. FED. R. CIV. P. 4(m). Rule 4 contains detailed provisions as to the
4 manner in which service must occur. “A liberal construction of Rule 4 ‘cannot be utilized as a
5 substitute for the plain legal requirement as to the manner in which service of process may be
6 had.’” SCHWARZER, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, ¶ 5:347 (2005) (quoting
7 *Mid-Century Wood Products, Inc. v. Harris*, 936 F.2d 297, 300 (7th Cir.1991)); *see also Prewitt*
8 *Enterprises, Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 924-25 (11th
9 Cir.2003) (holding that even though defendant had actual notice of the lawsuit, service of
10 process was ineffective because it was not in substantial compliance with Rule 4(f)).

11 Federal Rule of Civil Procedure 4(e) concerns service upon individuals within a judicial
12 district of the United States:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

21 FED. R. CIV. P. 4(e). Accordingly, under Rule 4(e), service of process should be upheld if it
22 conforms to either federal or applicable state service of process rules.

23 As set forth in Rule 4(e), service of process may be effected “pursuant to the law of the
24 state in which the district court is located . . .” FED. R. CIV. P. 4(e)(1). California law provides
25 for service of a summons upon an individual person “by delivering a copy of the summons and
26 of the complaint to such person or to a person authorized by him to receive service of process.”
27 CAL. CIV. PROC. CODE § 416.90. If, after reasonable diligence, the summons and complaint
28 cannot be personally delivered in accordance with Section 416.90, several methods of substitute

1 service are permitted. CAL. CIV. PROC. CODE § 415.20(b). One such method is effected by
 2 leaving a copy of the summons and complaint at the usual place of business of the person to be
 3 served, in the presence of a person apparently in charge, and afterwards mailing a copy of the
 4 summons and complaint to the same location. *Id.* Another method is effected by “leaving a
 5 copy of the summons and complaint at the person's dwelling house, usual place of abode, usual
 6 place of business, or usual mailing address other than a United States Postal Service post office
 7 box, in the presence of a competent member of the household or a person apparently in charge of
 8 his or her office, place of business, or usual mailing address other than a United States Postal
 9 Service post office box, at least 18 years of age, who shall be informed of the contents thereof,
 10 and by thereafter mailing a copy of the summons and of the complaint by first-class mail,
 11 postage prepaid to the person to be served at the place where a copy of the summons and
 12 complaint were left.” CAL. CIV. PROC. CODE § 415.20

13 It is undisputed that plaintiff, through her process server, left the summons and amended
 14 complaint in the door of defendant Knapik's home and did not leave a copy of the summons and
 15 complaint “in the presence of a competent member of the household or a person apparently in
 16 charge of his or her office” under California law, or “with some person of suitable age and
 17 discretion then residing therein” under federal law. Plaintiff argues that service was effectuated
 18 because the “documents were left at his [Knapik's] dwelling place and the affidavits of Mr.
 19 Washington and Ms. Maria Hermelinda Michel² clearly reflects that they made contact with
 20 defendant by cell telephone calls on April 10th, 2007 . . .” (Response at 2). Plaintiff also states
 21 that “[t]hese sworn affidavits . . . and the statement made in defendant Knapik [sic] motion to
 22 dismiss confirms that something happen [sic] . . .” *Id.* Notwithstanding plaintiff's belief that
 23 leaving the documents in Knapik's door, phoning defendant, and stating that “something
 24

25 ² Plaintiff sought leave to file the affidavit of Maria Hermelinda Michel on May 11,
 26 2007. [doc. #27] The Court granted plaintiff's *ex parte* application and ordered that plaintiff
 27 was to file with the Clerk of the Court and serve on opposing counsel and parties the affidavit of
 28 Ms Michel no later than May 18, 2007. [doc. #28]. To date, plaintiff has not filed the affidavit
 and therefore, has not complied with the Court's Order. Plaintiff is required to comply with
 orders of the Court. Further failure to comply with the Court's orders may result in sanctions
 being imposed on plaintiff notwithstanding her *pro se* status.

1 happen[ed]" on April 10, service was not effectuated under either the Federal Rules of Civil
2 Procedure or the California Civil Procedure Code.

3 As noted in the Court's Order filed May 22, 2007 [doc. #31], "[*p*]ro *se* litigants are not
4 entitled to ignore the Federal Rules of Civil Procedure and their requirements" . . . [and are not]
5 "exempt from complying with the basic rules for service of process. . . . Although plaintiff is
6 appearing without benefit of counsel, . . . she must comply with the Federal Rules of Civil
7 Procedure." (Order filed May 22, 2007 at 1-2).

8 Based on the foregoing, defendant Knapik is entitled to dismissal of the complaint, without
9 prejudice, for failure to effectuate service of process. In order to maintain this action against
10 Knapik, plaintiff must effectuate service of process in conformity with the Federal Rules of Civil
11 Procedure and within the 120 days provided under Rule 4(m) on defendant Knapik and all other
12 defendants named in the complaint.

13 **Conclusion**

14 Accordingly, **IT IS ORDERED** dismissing the amended complaint without prejudice as
15 to defendant John Knapik.

16 **IT IS SO ORDERED.**

17 DATED: June 5, 2007

18 
19 M. James Lorenz
United States District Court Judge

20 COPY TO:

21 HON. LEO S. PAPAS
UNITED STATES MAGISTRATE JUDGE

22
23 ALL PARTIES/COUNSEL

24

25

26

27

28